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CA FILE NO. 74-3160

In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No.

JAMES B. PACKARD,
Petitioner

VS.

KENNETH WELCH,
ROBERT HUNTER,
DENNIS SCHERZINGER,
ROBERT MULLIKIN,
ROBERT WHYTE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Plaintiff-Appellant, IN PROPRIA PERSONA, prays that a Writ of Certiorari issue to review the JUDGMENT DISMISSING APPEAL by the United States Court of Appeals for the Ninth Circuit entered in the above case on December 13, 1974.

Dated: February 26, 1975.

STATUTES, FEDERAL RULES AND REGULATIONS

U.S. CONST. ART. I Section 10 Cl. 1—"No State shall . . . , pass any . . . law impairing the obligation of contracts, . . ."

CALIFORNIA CONST. ART. I Section 16 (repealed 11/5/74)—"No . . . law impairing the obligation of contracts shall ever be passed."

CALIFORNIA CONST. ART. I Section 9 (Effective 11/6/74)—"A . . . law impairing the obligation of contracts may not be passed."

USCA TITLE 29-2111—"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

FRAP RULE 12 (c)—Dismissal for failure of appellant to cause timely transmission or to docket appeal.

FRAP RULE 12 (a)—Docketing the appeal.

USCA TITLE 28-1913—Court of Appeals fees and costs.

FRCP RULE 52 (a)—Findings by the Court.

FRCP RULE 41 (b)—Involuntary Dismissal: Effect thereof.

FRCP RULE 55 (b)—Default Judgment By The Court.

FRAP RULE 10 (b)—Transcript of Proceedings.

FRAP RULE 11 (a)—Time for Transmission of Record-on-Appeal.

FRAP RULE 10 (e)—Correction of the Record.

FRAP RULE 11 (d)—Extension of Time for Transmission of the Record-on-Appeal by District Court or Court of Appeals.

FRAP RULE 26 (b)—Enlargement of Time for good cause by the Court.

FRAP RULE 25 (a)—Filing may be accomplished by mail addressed to the clerk.

OPINIONS

January 23, 1975—Petition for Reconsideration denied upon due consideration.

December 13, 1974—Court of Appeals Order of Dismissal for failure to cause record to be timely filed—FRAP RULE 12 (c).

May 8, 1974—District Court Judgment of Dismissal based on Order of Dismissal because of Res Judicata. No finders of fact or conclusions of law.

November 5, 1974—Order re: Docket Fee and Appellant to submit a motion to file a late record.

July 15, 1974—Order returning record-on-appeal to District Court for correction.

June 14, 1973—*Packard v. Ginochio,* et al. California Court of Appeals re: Cal. Const. Art. I Section 16.

July 3, 1973—*Packard v. Hunter* California Court of Appeals re: Declaratory Judgment in connection with Cal. Const. Art. I Section 16.

April 11, 1972—Pub. Util. Comm. State of Cal. Dec. 79930 re: utility rate increases—Cal. Const. Art. I Section 16. Published.

October 6, 1970—Pub. Util. Comm. State of Cal. Dec. 77800 re: Utility Users' Tax. Published.

JURISDICTION

USCA TITLE 28-1254 (1)—United States Supreme Court review of Federal Court of Appeals Judgment.

USCA TITLE 29-2101 (c)—Application for Writ of Certiorari within 90 days after judgment or decree.

USCA TITLE 28-2106—Supreme Court may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, or order or require such further proceedings to be had as may be just under the circumstances.

USCA TITLE 29-42—Appeals from California Eastern District Court (Sacramento) to Ninth Circuit Court of Appeals.

U.S. CONST. ART. III Section 2 (1)—Jurisdiction of United States Courts extends to all cases in law and equity arising under this Constitution and the laws of the United States between citizens thereof.

UNITED STATES DISTRICT COURT JURISDICTIONS

USCA TITLE 28-84 (b)—Solano County within boundaries allocated to California Eastern District Court (Sacramento). City of Vallejo in Solano County. All defendants and plaintiff do business in City of Vallejo, California.

USCA TITLE 28-1343 (3)—Civil Rights Deprivation—redress.

USCA TITLE 28-1343 (4)—Damages and other relief under Act of Congress.

USCA TITLE 42-1983—Civil action for deprivation of rights.

USCA TITLE 18-242—Fine as penalty for deprivation of rights under color of law.

USCA TITLE 42-1988—Proceedings in vindication of Civil Rights.

USCA TITLE 29-1355—Fine, penalty, forfeiture under act of Congress exclusive of states.

U.S. CONST. ART. I Section 10 (1)—Prohibits violation of right of immunity from impairment of the obligation of contracts by individual.

QUESTIONS

1. Does the Court of Appeals have a duty to render a judgment based on an examination of the record?

2. Is it District Court's duty to make findings of fact and conclusions of law when rendering a deci-

sion based on res judicata under Federal Rules of Civil Procedure RULE 12 (b) (6)?

3. (a) Is a docket fee due before or after docketing?

(b) Should the record on appeal be filed by the clerk immediately after being received?

(c) Did Court of Appeals use proper procedure in returning record on appeal to District Court for correction?

(d) Was it proper to order appellant to submit a motion to file a late record?

(e) Does FRAP RULE 12 (c) authorize a dismissal of an appeal for failure to cause a corrected record on appeal to be timely filed?

4. Does this appellant have right of immunity from impairment of the obligation of his contracts?

5. Does U. S. Const. Art. I Section 10 (1) "No State shall pass any law impairing obligation of contracts" protect and secure right of immunity from impairment of the obligation of contracts?

6. Is it District Court's duty to issue a default judgment for failure to answer a complaint if a Motion to Dismiss is over-ruled?

STATEMENT OF CASE

On February 19, 1974 plaintiff-appellant IN PROPRIA PERSONA by leave granted by District Court filed his Amended Complaint naming five new defend-

ants. Defendants Mullikin, Welch, Hunter and Whyte were duly served with Summons and Complaint by the U. S. Marshal on February 21, 1974. Defendant Scherzinger was "out of town" when service was performed, and no person had been designated to accept service of summons in his behalf. However, on March 22, 1974 Defendant Scherzinger's attorney filed an appearance in this case and has since actively participated in all the proceedings.

In the Amended Complaint plaintiff-appellant accused all defendants of willfully under color of ordinances and regulations subjecting him to the deprivation of his rights, privileges and immunities secured and protected by the Constitution of the United States. To wit: U.S. Const. Art. I Section 10 (1); and asked the Court for a total of 8.533 million dollars as damages from defendants.

Plaintiff-appellant complained that all defendants were impairing the obligations of his contracts by adding a utility user's tax, raising his rates, adding new charges in form of sewer charges, sewer service charges, water service charges, heat factors and gas off-set charges and raising the rates on these charges causing plaintiff-appellant monthly losses that have grown to the present time to the rate of 67 dollars per month and these losses are still continuing and growing.

No answers have been filed to the Amended Complaint by any of the defendants. However, Motions to Dismiss were filed by all defendants and a hearing was held April 15, 1974 in which District Court dis-

missed the Amended Complaint on basis of "12 (b) (6)." The Order of Dismissal prepared at the request of the Court by attorney for defendants Welch and Hunter apparently was signed by the judge dismissing the case on basis of Res Judicata with no findings of fact or conclusions of law. A subsequent hearing was held May 20, 1974 on plaintiff-appellant's Motion to Vacate and Set Aside, and the Court let the Order stand.

On May 8, 1974 District Court Clerk issued Judgment of Dismissal based on the decision "duly rendered April 15, 1974."

Notice of Appeal was timely filed by plaintiff-appellant in District Court on May 31, 1974. On July 10, 1974 the record-on-appeal and reporter's transcript was mailed to clerk of Ninth Circuit Court of Appeals. Pursuant to letter from plaintiff-appellant to Clerk Luck on July 15, 1974 record-on-appeal was returned to District Court for correction. September 11, 1974 corrected record-on-appeal was forwarded to Court of Appeals and received September 12, 1974.

In the first official Notice from Court of Appeals dated November 5, 1974, concerning the Docket Fee the Clerk of Court of Appeals notified plaintiff-appellant and all counsel that Docket Fee of 50 dollars was "past due" and also ordered plaintiff-appellant to submit a Motion to File a Late Record. On November 8, 1974 plaintiff-appellant submitted Motion to File a Late Record requesting the Court to declare him blameless. Also, attached to the Motion was the Docket Fee for 50 dollars.

On November 19, 1974 this case was docketed in Ninth Circuit Court of Appeals. However on November 16, 1974 appellees Welch and Hunter filed Motion to Docket and Dismiss and joinder motions were submitted by all other defendants. All appellees stated the record-on-appeal had been timely transmitted. The Docket and Dismiss Motion was based on failure of appellant to comply with FRAP RULE 10 (b).

In reply plaintiff-appellant submitted Appellate Court Exhibit Number One showing timely compliance with FRAP RULE 10 (b).

On December 13, 1974 Court of Appeals issued Judgment and Order of Dismissal for failure of this appellant to cause the record-on-appeal to be timely filed. A Request for Reconsideration was mailed on December 24, 1974. Appellees all submitted Memorandums of Points and Authorities in Opposition, and on January 28, 1975 Court of Appeals issued Order Denying Petition for Reconsideration "Upon due consideration."

Prior to January 28, 1975 plaintiff-appellant had submitted a Motion re: Items Missing from the Docket Record on January 23, 1975.

Also, plaintiff-appellant has submitted motions for Stay of Mandate, and Request to Clerk to Certify and Transmit Entire Record in form of original papers to the Supreme Court of the United States, which have not been acted on to this appellant's knowledge as of this date.

The Ninth Circuit Court of Appeals has obviously failed to do its duty as prescribed by USCA TITLE 28-2111 for dismissing an appeal without an examination of the record.

ARGUMENT

Since Court of Appeals has failed in its duty USCA TITLE 28-2111 to examine record on appeal, this appellant presents this argument to the Supreme Court of the United States.

This appellant believes he has the right of immunity from impairment of the obligation of his contracts and this right is guaranteed by United States Constitution Article I Section 10 (1). To wit: "No State shall pass any law impairing the obligation of contracts."

Proper interpretation of the word "pass" in above quoted section is necessary. "Pass" is a verb and it is used transitively because it has a direct object—"any law". According to Webster's Dictionary, also Funk and Wagnall's when "pass" is used transitively it means "officially sanction" or "allow."

This appellant interprets above quoted section to mean—within any state of the United States no law shall be allowed under the color of which an individual may impair the obligation of contracts, because of the basic right every person has of immunity from impairment of the obligation of contracts. Em-

ploying means of impairing obligation of contracts under color of a law is using a law to impair obligation of contracts which U. S. Const. Art. I Section 10 (1) prohibits; and thus protects this appellant's right of immunity from impairment of the obligation of his contracts by some individual under the color of a law within a state of the United States.

In contrast Article I Section 16 of California State Constitution To wit: "No law impairing the obligation of contracts shall ever be passed" is a prohibition on any law making body in the state to make valid a law impairing obligation of contracts. Note word "passed" is used intransitively and according to Webster's Dictionary means "make valid" when used intransitively. In *Packard v. Ginochio* (see appendix J) the State Court of Appeal with the silent affirmance of the State Supreme Court interpreted Cal. Const. Art. I Section 16 to mean it proscribes any law impairing obligation of contracts. Cal. Const. Art. I Section 16 did not prohibit adding another obligation to a contract and did not protect right of immunity from impairment of the obligation of contract. Adding another obligation to a contract makes existing obligations worse—harder to meet—thus impairing obligation of contract and violating right of immunity of impairment of obligation of contract.

However, Cal. Const. Art. I Section 16 was repealed at the last November 5, 1974 election. This appellant requests judicial notice be taken of this fact. USCA TITLE 44-1507. It is now Cal. Const. Art. I Section 9

and states "A law impairing the obligation of contracts may not be passed." The change is instead of "shall ever be passed" it is "may not be passed" which this appellant interprets as "it is not permissable to make valid a law impairing the obligation of contracts by a law making body." This appellant believes the meaning and intent of this new law is substantially the same as old above quoted Cal. Const. Art. I Section 16. Also if a law is passed (made valid) it is assumed that the law does not impair the obligation of contracts.

Justice Douglas in *England v. Louisiana Med. Examiners,* 84 S.Ct. 461 (1964) stated in his concurring opinion that "If the state law is construed one way, the constitutional issue may disappear. The Federal Constitutional question will survive only if one of two or more constructions is adopted." The state constitution law old Art. I Section 16 has been construed to not protect this appellant's right of immunity from impairment of the obligation of his contracts by the highest state tribunal. It now remains to be determined by this Supreme Court whether U. S. Const. Art. I Section 10 (1) protects right of immunity from impairment of the obligation of contracts. Also, whether Res Judicata applies.

In summarization this plaintiff-appellant believes he has shown that Cal. Const. Art. I Section 16 and new Art. I Section 9 is a prohibition on law making bodies. Whereas U. S. Const. Art. I Section 10 (1) is a prohibition on individuals. Res Judicata cannot be applied because of this appellant's state court de-

termination of old Art. I Section 16. This appellant did not plead U. S. Const. Art. I Section 10 (1) in any of his state court cases.

CONCLUSION

If this Supreme Court believes that this appellant does not have right of immunity from impairment of obligation of his contracts then this writ should be denied.

If this Supreme Court believes that this appellant does have the right of immunity from impairment of the obligation of his contracts, then of course the writ should be allowed, and the record examined for unlawful past and future violations of this appellant's constitutionally guaranteed right of immunity from impairment of the obligation of his contracts, and also whether damages should be adjudged to this appellant from respondents.

This appellant believes sound judicial discretion demands allowance of this writ.

JAMES B. PACKARD,
715 Tennessee Street
Vallejo, California 94590,
Telephone: (707) 644-8221,
Petitioner, In Propria Persona.

CASES AND CITATIONS SHOWING RIGHT OF IMMUNITY FROM IMPAIRMENT OF THE OBLIGATION OF CONTRACT UPHELD

15 L.ED. 401—Dodge v. Woolsey—Imposing tax.

20 L.ED. 48—Parmalee v. Lawrence—Increasing interest rates.

21 L.ED. 357—Walker v. Whitehead—Law in effect at time—obligation.

24 L.ED. 354—M. & E. RR. v. Yard—Subsequent act increasing tax.

24 L.ED. 761—Murray v. Charlestown—Imposing tax.

27 L.ED. 813—Ruggles v. Illinois—Conductor increased charge 2 cents.

27 L.ED. 819—Illinois RR. v. Illinois—RR. fined 1000 dollars for charging customer rate in excess of rate fixed by Comm.

35 L.ED. 945—C. of New Orleans v. N.O.W.W.—Water for taxes. Bill sent for taxes.

41 L.ED. 211—Bk. of Comm. v. Tennessee—New shares taxed. Old shares not.

57 L.ED. 510—Home Tel. & Tel. v. C. of L.A.—Setting rates too low.

61 L.ED. 272—Detroit S. R.R. v. Michigan—Two different fares allowed after acquisition.

67 L.ED. 124—Wichita El. v. PUC—PUC Order raising rate void—no findings.

71 L.ED. 420—Ottinger v. Cons. Gas of N.Y.—decreasing rate—gas delivered over 650 BTUs per cu. ft. not safe.

75 L.ED. 562—Coolidge v. Long—imposing a tax.

96 L.ED. 338—Geo. RR. & Bkg. Co. v. Redwing—Imposing a tax.

100 L.ED. 387—United Gas Pipe Line v. Mobile Gas—FPC act authorizing unilateral contract changes.

173 Cal. 291—So. Pac. RR. v. Spring Valley W.W.—Free water.

181 Cal. 306—City of Madera v. Black—Imposing sewer charge.

25 C.A. 3d 750—So. Lake Tahoe Gas v. Hofman Land Co.—Rate increased by quickly issued Cal. PUC tariff sheet.

479 F.2d 1165—Burr v. New Rochelle Hsg. Auth.—Rent increased by service charge.

483 S.W. 2d 174—In Re. S.C. License Fees—Increasing attorneys' fees—findings.

281 A.2d 19—Globe Liquor v. Four Roses Dist. Co.—Contract consummated 8/1/69, new law 7/8/70.

508 P.2d 324—Tower Plaza v. DeWitt—Taxing the taxable event.

(Appendices Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

No. 74-3160

James B. Packard,
Plaintiff-Appellant,

vs.

State of Calif., et al.,
Defendant-Appellee.

[Filed Dec. 13, 1974]

ORDER
Dismissing Appeal

Before: CHAMBERS and WRIGHT, Circuit Judges.

Upon consideration of appellees' motion and the opposition thereto, the appeal herein is dismissed for failure to cause the record to be filed timely. Rule 12(c) Fed. F. App. P.

/s/ Richard H. Chambers
/s/ Eugene A. Wright
U. S. Circuit Judges

Mo Cal 12/9/74

Appendix B

(Notice of Entry of Judgment)

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Dec. 13, 1974

74-3160—James B. Packard v. State of California

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered Dec. 13, 1974, dismissing the appeal. The judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk

U.S. Court of Appeals

Appendix C

United States Court of Appeals for the Ninth Circuit

No. 74-3160

James B. Packard,
Plaintiff-Appellant,

vs.

State of California et al.,
Defendant-Appellee.

[Filed Jan. 28, 1975

ORDER
Denying Petition for Reconsideration

Before: CHAMBERS and WRIGHT, Circuit Judges.

Upon due consideration, appellant's petition for reconsideration of the order of this Court entered December 13, 1974 is hereby denied.

/s/ Richard H. Chambers
/s/ Eugene A. Wright
U. S. Circuit Judges

Mo Cal 12/9/74

Appendix D

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

July 15, 1974

William C. Robb, Clerk
United States District Court
Eastern District of California
650 Capitol Mall
Sacramento, CA 95814

Re: CA Undocketed, James B. Packard, Plaintiff-Appellant, vs. State of California, Defendant-Appellee, DC # Civil S-2978.

Dear Mr. Robb:

The above-referenced appeal is returned to you in accordance with Rule 10(e), Federal Rules of Appellate Procedure.

The Record on Appeal does not contain a Designation of Record.

A copy of appellant's letter dated July 12, 1974 initiating this action was mailed to you by Mr. Pack-

ard; however, I am also enclosing a copy of that same letter.

Thank you for your interest in this matter.

Sincerely,
Emil E. Melfi, Jr.,
Clerk
By: Jean E. Hazelton
(Mrs.) Jean E. Hazelton
Deputy Clerk

Encl.
cc: All Counsel

Appendix E

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

November 5, 1974

James B. Packard
715 Tennessee Street
Vallejo, CA 94590

Re: CA Undocketed, James B. Packard, Plaintiff-Appellant, vs. State of California, et al., Defendants-Appellees, D.C. # Civil S-2978.

Dear Counsel:

A notice of appeal has been received by this Court in the above entitled matter.

Your attention is directed to Rule 12 of the *Federal Rules of Appellate Procedure,* Rule 20 of the *Rules of the Ninth Circuit,* and to the following dates:

May 31, 1974. Notice of Appeal Filed.

July 10, 1974. $50.00 Docket Fee Due, Past Due.

You will need to submit a motion to file a late record.

Your immediate attention to this matter will insure the timely processing of this appeal.

Very truly yours,

Emil E. Melfi, Jr.,
Clerk of Court

By: Jean E. Hazelton
(Mrs.) Jean E. Hazelton,
Deputy Clerk

Note: Please remit the Docket Fee, payable to the Clerk, United States Court of Appeals, to the attention of the Docketing Unit.

cc: All Counsel.

Appendix F

Judgment on Decision by the Court Civ. 32 (7-63)
United States District Court
for the
Eastern District of California

Civil Action File No. S-2978

James B. Packard,

vs.

State of Calif.; Ronald Reagan; et al.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Philip C. Wilkins, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, April 15, 1974.

It is Ordered and Adjudged that judgment be entered in favor of the defendants and that the case is dismissed.

Dated at Sacramento, California, this 8th day of May, 1974.

William C. Robb,
Clerk of Court

pas

Entered May 8, 1974
Clerk, U. S. District Court
Eastern District of California
By
Deputy Clerk

Appendix G

United States District Court
for the Eastern District of California

No. Civ. S-2978

James B. Packard,

vs.

State of Calif.; Ronald Reagan, et al.

NOTICE

To:

James B. Packard
715 Tennessee Street
Vallejo, Calif. 94590

Paul L. Klose, Esq.
Deputy City Attorney—Vallejo
City Hall
Vallejo, Calif. 94590

Ronald N. Paul, Esq.
Downey, Brand, Seymour & Rohwer
555 Capitol Mall
Sacramento, Calif. 95814

Bernard J. Favaro, Esq.
300-A Tuolumne St.
Vallejo, Calif. 94590

You Are Hereby Notified that on May 8, 1974 Judgment Was Entered in the above entitled case.

Sacramento, California
May 8, 1974

William C. Robb,
Clerk, U. S. District Court
pas

Appendix H

John M. Powers
City Attorney, City of Vallejo, City Hall
Vallejo, California 94590 (707) 643-1311, Ext.251
Attorney for Defendants
Kenneth Welch & Robert Hunter

United States District Court
Eastern District of California

No. S-2978

James B. Packard,
Plaintiff,

vs.

Kenneth Welch, Treasurer;
Robert Hunter, Water Superintendent;
Dennis Scherzinger, Manager;
Robert Mullikin, Manager;
Robert Whyte, Manager,
Defendants.

[Filed Apr. 17, 1974]

ORDER GRANTING MOTIONS TO DISMISS ACTION

The motions of defendants for an order to dismiss the action having come on for hearing this date, and the Court being fully advised,

It Is Ordered that the motions to dismiss the action against all the defendants are hereby granted on the grounds that all of the claims stated in said action are *res judicata.*

Dated: Apr. 16, 1974.

Philip C. Wilkins,
United States District J

Appendix I

(Not to be Published in Official Reports)

In the Court of Appeal of the State of California

First Appellate District, Division Three

1 Civil 31702 (Sup. Ct. No. 52994)

James B. Packard,
Plaintiff and Appellant,
vs.
Robert Hunter,
Defendant and Respondent.

[Filed Jul. 3, 1973]

OPINION

Appellant, in propria persona, contends that (1) a defendant may not demur to an amended complaint and (2) that the increase in water rates imposed by an ordinance adopted by the City Council of the City of Vallejo unconstitutionally impaired the obligation of his contract for water with the City of Vallejo.

Appellant contends that no demurrer may be interposed to test an amended complaint because Code of Civil Procedure section 432 (now Code Civ. Proc., § 471.5) requires an amended complaint to be answered. Appellant misunderstands the import of Code

of Civil Procedure section 432. This section required an answer to an amended complaint "within 10 days after service thereof." This does not preclude the filing of a demurrer within the time to answer. Demurrers may be filed to test amended complaints as long as the plaintiff is allowed to amend his complaint and elects to do so in the hope of stating a cause of action. (See e.g., Johnson v. Ehrgott, 1 Cal. 2d 136, consideration of a demurrer filed in response to the tenth amended complaint.)

It is long established that the supplying of water by a city to its inhabitants is a municipal purpose and the fixing of rates and charges for water is a legislative function. (Marin Water Etc. Co. v. Town of Sausalito, 168 Cal. 587, 604; McQuillin, Municipal Corporations, 1970, Rev. Vol. 12, § 35.37, p. 480.) Appellant's contention relative to impairment of his rights under a contract to furnish water by the City of Vallejo has been answered adversely in *Limoneira Co. v. Railroad Commission,* 174 Cal. 232, 238, where the court stated that the power to proscribe the rates at which water is furnished ". . . is a continuing power that may be exercised at any time, regardless of any attempted contract existing between the public utility and the consumer. . . ."

Appellant states in his opening brief that he is attempting to proceed under Code of Civil Procedure section 1060. This section, under which a party may secure a declaratory judgment, provides in relevant part as follows: "Any person . . . who desires a declaration of his rights or duties with respect to an-

other . . . may, in cases of actual controversy relating to the legal rights and duties in the respective parties, bring an original action in the superior court . . . for a declaration of his rights and duties in the premises, . . ."

Despite the now established rule that the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration, the matter may be decided on demurrer if the plaintiff's claim is clearly unfounded as a matter of law. (See 3 Witkin, Cal. Procedure, (2d ed. 1971) Pleading, §§ 730-732, p. 2350.) This is the situation in the instant case. Moreover, whether declaratory relief should be granted is a matter for the sound discretion of the trial court. (LePage v. City of Oakland, 13 Cal.App.3d 689, 692; Code Civ. Proc., § 1061.) The complaint here is against the City Water Superintendent who, plaintiff admits, is acting in accordance with Ordinance No. 26 N.C. 2d. His disagreement is not with respondent but is directed to the ordinance adopted by the City Council. Neither the City of Vallejo, nor the City Council has been named as party defendants in this action. There is, therefore, no actual controversy set forth in the complaint and the court did not abuse its discretion in sustaining the demurrer without leave to amend.

Judgment is affirmed.

Brown (H. C.), J.

I concur:

Caldecott, J.

Appendix J

(Not to be Published in Official Reports)

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil 31264 (Sup. Ct. No. 50117)

James B. Packard,
Plaintiff and Appellant,
vs.
C. E. Ginochio, et al.,
Defendants and Respondents.

[Filed June 14, 1973]

OPINION

Plaintiff James B. Packard has appealed from a judgment dismissing his action after the sustaining of a general demurrer, without leave to amend, to his "Petition [as amended] for Injunction Prohibiting Collection of [a] Utility Users Tax" imposed by the City of Vallejo. By the petition he also sought damages against defendants, some of whom are officers or employees of public utility companies and others, officials of the City of Vallejo.

An ordinance of the City of Vallejo imposed a utility user's tax on persons using gas, electricity, or

telephone service supplied by public utilities. The tax was an amount equal to five percent of the charges for such service, and the public utilities were required to collect and remit the tax. The sole issue on the demurrer in the superior court was whether the tax was legally and constitutionally permissible.

Such a tax was upheld against a broad attack by the California Supreme Court in the recent case of *Rivera v. City of Fresno,* 6 Cal.3d 132.

Packard, however, contended in the superior court, and now contends here that certain pertinent constitutional and statutory provisions were neither argued nor considered in *Rivera.* We proceed to determine these several contentions, seriatim.

I. California Constitution, Article I, Section 16

This provision proscribes the enactment of any law "impairing the obligation of contracts."

Packard's argument is that the utility user's tax somehow increased the amounts which he was obliged to pay under his contracts with the several public utilities. The contention is patently invalid.

The tax created a liability of the utility user to the City of Vallejo measured by the amount of utilities used. It did not affect the user's obligations under any contracts he may have had with the public utilities. And certainly the requirement that the public utilities collect and remit the tax did not add to the user's burdens under such contracts.

The case of *National Ice etc. Co. v. Pacific F. Exp. Co.,* 11 Cal.2d 283, lends no aid to Packard's instant

contention. There a statute imposed a tax on retailers but permitted them to pass it on to the consumers. It was held that the tax could not be "passed on" to a consumer thus increasing the amount due from him under a contract which *antedated* the tax statute. The court stated that it would violate due process to require that a tax debt owed by one person must be paid by another. In the case before us we are not concerned with a tax levied on the public utilities, but permitted to be passed on to the utility user; instead the tax was levied upon the utility user.

II. California Constitution, Article XIII

On this point Packard restricts his argument to the simple statement that article XIII prohibited the utility user's tax. This article consists of 41 more or less lengthy sections dealing with "Revenue and Taxation." Contentions which are not argued in the briefs on appeal are ordinarily deemed waived. (See 6 Witkin, Cal. Procedure (2d ed.), § 425, pp. 4391-4393.) We have nevertheless examined the whole of article XIII; nothing is found indicating the invalidity of the tax ordinance here under consideration.

III. Revenue and Taxation Code section 7203, subdivision 4

This statute provides that "the storage or use of tangible personal property in the transportation or transmission of persons, property, or communications or in the generation, transmission or distribution of electricity or in the manufacture, transmission or dis-

tribution of gas in intrastate, interstate or foreign commerce by public utilities which are regulated by the Public Utilities Commission of the State of California shall not be subject to a use tax." It prevents a use tax upon certain tangible property of public utilities, a subject with which we are not here concerned.

IV. Revenue and Taxation Code section 6353

Revenue and Taxation Code, division 2, part 1 (§§ 6001-7176), deals generally with "Sales and Use Taxes." Section 6353 exempts from such taxes "the gross receipts from the sales, furnishing, or service of and the storage, use, or other consumption in this State of gas, electricity, and water when delivered to consumers through mains, lines, or pipes."

The statute prevents imposition of certain taxes on "gross receipts" upon the "suppliers" of gas, electricity, and water delivered to consumers. In the case at bench the tax is neither imposed upon the "suppliers," i.e., the public utilities, nor upon their "gross receipts." Revenue and Taxation Code section 6353 is also inapposite.

V. Public Utilities Code sections 451 and 532

A study of these statutes which deal generally with the charges of and services rendered by public utilities indicates no support whatever for Packard's argument that the utility user's tax is illegal. Here again, without argument, these statutes are presented for the "court's consideration."

VI. "P.U.C. Decision 77,800"

It is urged that this decision "did not uphold the fact that the utility user's tax was a valid charge." The decision, which we have read, does not in any way consider or pass upon the *validity* of the subject tax; it is wholly irrelevant to the issue before us.

The utility user's tax of the City of Vallejo was without constitutional or statutory infirmity. Packard's "petition" stating no cause of action, defendants' general demurrer was properly sustained, and the judgment of dismissal was properly entered.

The judgment of dismissal is affirmed. A purported appeal from an "Order Sustaining Demurrers Without Leave to Amend" (a nonappealable order; see Beazell v. Schrader, 59 Cal.2d 577) is dismissed.

Elkington, J.

We Concur:
Molinari, P.J.
Sims, J.

Appendix K

Decision No. 79930
Before the Public Utilities Commission
of the State of California

James B. Packard, Complainant, vs. The Pacific Telephone and Telegraph Company, Defendant.	Case No. 9326
James B. Packard, Complainant, vs. Pacific Gas and Electric Company, Defendant.	Case No. 9327

ORDER OF DISMISSAL

In Case No. 9326, Complainant has alleged that Defendant, The Pacific Telephone and Telegraph Company (PT&T), has arbitrarily raised its rates to Complainant without his consent. He asks for damages of $658,000, as well as a refund of $577.15, which is his calculation of the difference in the rates charged in 1947 and the amount that PT&T has collected from him since then.

In Case No. 9327, Complainant seeks damages in the amount of $1,500,000 from Defendant Pacific Gas and Electric Company (PG&E) as well as a refund

of $360.74, based on the difference between the rate schedules in force at the time Plaintiff's gas and electric services were initiated and the present rates for these services.

Since the theories of both complaints proceed on common grounds, they will be consolidated for purposes of this order.

Complainant indicates that he obtained services from Defendants on the dates shown in his complaint and at no time has agreed to pay higher rates than those established at the time of commencement. Thus, Complainant states that:

> "Plaintiff's Complaint based on prohibition of Cal.Const. Art. I Section 16, Public Utilities Code Section 451—unjust charges—and Section 532—Commission prohibited from authorizing any increase in plaintiff's contract rates previously filed with and authorized by the Commission without plaintiff's consent."

Article XII, Section 23 of the California Constitution reads, in part, as follows:

> "The Public Utilities Commission shall have and exercise such power and jurisdictioin to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, *and the right of the Legislature to confer powers upon the Public Utilities Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.*" (Emphasis added.)

The Legislature has conferred the power to fix rates to be charged by public utilities on the Commission. Public Utilities Code, §§451, *et seq.* Defendants are public utilities within the provisions of Article XII, §23 of the California Constitution and §§218, 222, and 234 of the Public Utilities Code.

No allegation is made that either Defendant charged or received payment in excess of effective tariffs on file with the Commission at the time service was rendered.

Motions to dismiss were filed by each Defendant. These motions will be granted. Complainant has stated no action of the Defendants which is violative of law or public policy. It would appear that Complainant is under the misapprehension that utility rates are a private contract matter between the utility and the customer. This is not so. Just and reasonable rates are set by this Commission (Public Utilities Code, §451) and the utility is required to charge those rates, and no others, unless with the special permission of the Commission. Public Utilities Code, §453. At such time as the Commission duly determines that a different rate is required, it becomes the just and reasonable rate, and all other charges become unlawful. Public Utilities Code, §451.

Insofar as Complainant asks for damages other than a return of moneys paid to the Defendants, it seeks a remedy not within the power of this Commission to accord. Money damages are a matter for the courts.

The complaints herein are dismissed for failure to state a cause of action.

The effective date is the date hereof. The Secretary is directed to serve a copy of this order on all parties to this proceeding.

Dated at San Francisco, California, this 11th day of April, 1972.

J. P. Vukasin, Jr.
Chairman

William Symons, Jr.
Thomas Moran
Vernon L. Sturgeon
D. W. Holmes
Commissioners

Certified as a True Copy
(Illegible)
Assistant Secretary
Public Utilities Commission
State of California

Appendix L

Decision 77800

ORDER

It Is Ordered that:

1. The Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T) and Pacific Gas and Electric Company (hereinafter referred to as PG&E) shall not disconnect or threaten to disconnect the utility service of Packard or any other customer who pays for such service but who refuses to pay the utility users tax contained in Vallejo Ordinance No. 909 N.C.

2. PT&T and PG&E shall do no more than be a billing and remitting conduit in connection with the utility users tax contained in Vallejo Ordinance No. 909 N.C. and shall take no collection agency or court action against Packard or any other Vallejo customer for failure to pay said tax. PG&E shall resist any change in its administrative agreement with Vallejo which would require it to act contrary to the requirements of this order.

3. Within thirty days after the effective date of this order, PG&E shall revise its billing practices so that where Packard or any other Vallejo customer intentionally withholds utility user tax payments, the accumulated withheld tax payments are either (1) accumulated on the billing line showing the amount of tax due or (2) separately stated as accumulated tax due if included on the billing line entitled, "Previous Balance".

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 6th day of October, 1970.

J. P. Vukasin, Jr.
Chairman

A. W. Gatov
William Symons, Jr.
Thomas Moran
Vernon L. Sturgeon
Commissioners

Certified as a True Copy
William W. Dunlop
Secretary Public Utilities Commission
State of California